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Malayan Banking Bhd v Punjab National Bank

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HIGH COURT (KUALA LUMPUR) — SUIT NO 22NCC-28–01 OF 2014
HASNAH HASHIM J
12 MAY 2015

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Civil Procedure — Jurisdiction — Forum conveniens — Foreign defendant applied to set aside writ and statement of claim served upon it by Malaysian plaintiff on ground High Court in Malaya not proper forum to hear dispute between parties — Defendant contended cause of action took place in India — Whether defendant's contention valid

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The defendant, an Indian-based bank, provided letter of credit ('LC') facilities at the request of its customer, Sara International Ltd ('Sara') in favour of a Malaysian-based company, SIMS Copper Sdn Bhd ('the beneficiary') to facilitate payment for sale of goods by the beneficiary to Sara. The plaintiff advised the beneficiary in the LC transaction. Under the terms of the LC, the defendant irrevocably undertook to reimburse the plaintiff for any payment it made to the beneficiary under the LC upon negotiation of requisite documents presented to it by the beneficiary. When the beneficiary presented the required documents under the LC to the plaintiff, the latter negotiated the same and paid out USD1,983,765.65 to the beneficiary. The defendant refused to reimburse the plaintiff for the said amount contending there were discrepancies in the documents presented. In the instant action by the plaintiff to recover the said amount from the defendant, the latter applied to set aside the writ and statement of claim that had been served upon it out of jurisdiction on the ground the High Court in Malaysia was not the proper forum to hear the dispute between the parties as the cause of action took place in India, specifically in New Delhi.

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Held, dismissing the application with costs:

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(1) The High Court in Malaya had jurisdiction to hear the instant matter. Although the defendant was not present within jurisdiction and had not submitted to the jurisdiction of the Malaysian Court, the fact remained that the statement of claim was based on a cause of action which arose in Malaysia. The LC was issued by the defendant in favour of the beneficiary based in Kuala Lumpur ('KL'). The LC was advised by the plaintiff in KL, the documents were presented to the plaintiff, the LC was negotiated in Malaysia and payment was received by the beneficiary in Malaysia. The court was of the view that the cause of action arose in Malaysia as the place where payment to the beneficiary was made (see paras 34–36).

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(2) All the original documents relating to the LC had been returned to the plaintiff in Kuala Lumpur. The main issue to be determined at trial was whether the defendant, which was required by the LC to reimburse the plaintiff upon the beneficiary's presentation of the documents, had given a valid notice to refusal pursuant to the UCP600 (see paras 36–37).

[Bahasa Malaysia summary

Defendan, bank India, menyediakan surat kredit ('SK') atas permohonan pelanggannya, Sara International Ltd ('Sara') dalam memihak syarikat-syarikat Malaysia, SIMS Copper Sdn Bhd ('benefisiari') untuk memudahkan bayaran bagi jualan barangan oleh benefisiari kepada Sara. Plaintif mengesahkan benefisiari dalam transaksi SK. Di bawah terma-terma SK, defendan berjanji untuk membayar balik kepada plaintif apa-apa bayaran yang ia buat kepada benefisiari di bawah SK atas perundingan dokumen-dokumen diperlukan yang dikemukakan kepadanya oleh benefisiari. Apabila benefisiari mengemukakan dokumen-dokumen yang diperlukan tersebut di bawah SK kepada plaintif, plaintif merujuk yang sama dan membayar sebanyak USD1,983,765.65 kepada benefisiari. Defendan enggan membayar balik kepada plaintif bagi jumlah tersebut dengan berhujah bahawa terdapat percanggahan dalam dokumen-dokumen yang dikemukakan. Dalam tindakan ini oleh plaintif untuk mendapatkan balik jumlah tersebut daripada defendan, defendan memohon untuk mengetepikan writ dan penyataan tuntutan yang telah diserahkan ke atasnya di luar bidang kuasa atas alasan Mahkamah Tinggi Malaysia bukan forum sesuai untuk mendengar pertikaian di antara kedua pihak kerana kausa tindakan bermula di India, khususnya New Delhi.

Diputuskan, menolak permohonan dengan kos:

(1) Mahkamah Tinggi Malaya mempunyai bidang kuasa untuk mendengar perkara ini. Walaupun defendan tidak berada dalam bidang kuasa dan tidak termasuk dalam bidang kuasa Mahkamah Malaysia, fakta kekal bahawa penyataan tuntutan adalah berdasarkan atas kausa tindakan yang berbangkit di Malaysia. SK tersebut dikeluarkan oleh defendan memihak benefisiari yang tinggal di Kuala Lumpur ('KL'). SK disahkan oleh plaintif di KL, dokumen-dokumen dikemukakan kepada plaintif, SK dirundingkan di Malaysia dan bayaran diterima oleh benefisiari di Malaysia. Mahkamah berpendapat bahawa kausa tindakan berbangkit di Malaysia sebagai tempat di mana bayaran kepada benefisiari dibuat (lihat perenggan 34–36).

(2) Kesemua dokumen asal berkaitan SK telah dikembalikan kepada plaintif di Kuala Lumpur. Isu utama untuk ditentukan di perbicaraan adalah sama ada defendan, yang mana dikehendaki oleh SK untuk membayar balik kepada plaintif atas pengemukaan benefisiari terhadap dokumen-dokumen tersebut, telah memberi notis sah untuk menolak berikutan UCP600 (lihat perenggan 36–37).]

Notes

For cases on forum conveniens, see 2(3) *Mallal's Digest* (5th Ed, 2015) paras 5745–5769.

Cases referred to

American Express Bank Ltd v Mohamad Toufic Al-Ozier & Anor [1995] 1 MLJ 160; [1995] 1 CLJ 273, SC (refd)

Legislation referred to

Banking Companies (Acquisition and Transfer of Undertakings) Act 1970 [IND]
Courts of Judicature Act 1964 s 23(1)
Rules of Court 2012 O 11 r 1, O 12 rr 2, 10(1), 10(2), 10(5), O 92 r 4

CS Mong (Elsie Ng and Chia Oh Sheng with him) (Lee Hishammudin Allen & Gledhill) for the plaintiff.
Brijnandan Singh Bhar (Shailender Bhar and G Rajpal with him) (Brijinandan Singh Bhar & Co) for the defendant.

Hasnah Hashim J:

[1] Enclosure 12 is the application by the defendant pursuant to O 12 rr 2 and 10(1) and/or O 92 r 4 of the Rules of Court 2012 ('the ROC') and/or under the inherent jurisdiction of this court for the following relief(s) and/or order(s):

(a) liberty be given to the defendant to file the application here;

(b) the defendant's appearance does not constitute a waiver and submission to the jurisdiction of the court is as premised under O 12 r 10(5);

(c) the plaintiff's writ and statement of claim dated 24 January 2014, notice of writ to be served out of jurisdiction dated 11 March 2014, order for service out of jurisdiction dated 6 March 2014 and all others filed here be set aside, discharged and dismissed;

(d) an order be granted setting aside the writ or service of the writ on the defendant;

(e) an order be granted declaring that the writ has not been duly served on the defendant;

(f) a discharge be granted of any order giving leave to serve a notice of the writ on the defendant out of the jurisdiction;

(g) a declaration be granted on the basis that, in the circumstances of the case, this court nor any other court in Malaysia has jurisdiction over the defendant in respect of the subject matter of the claim or the relief or

A remedy sought in the action by the plaintiff;

(h) the plaintiff's writ and statement of claim and all others filed be set aside on the ground that this court nor any other court in Malaysia has jurisdiction to hear or entertain the dispute between the plaintiff and the defendant;

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(i) the proper forum for this dispute is the High Court of Delhi or any other court in Delhi, India as the letter of credit were issued in India, rejection of letters of credit were made in India, the buyer and/or purchase is in India, the letter of credit opening bank is in India and the main cause of action has arisen in India;

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(j) the costs of and incidental to this application be borne by the plaintiff and to be paid forthwith; and

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(k) such further and other directions and/or orders be made and/or given as this court deems fit and just.

[2] The application is supported by the defendant's affidavit in support of Shaila Jain w/o Shri G S Jain affirmed on 21 June 2014.

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THE GROUNDS

[3] The writ and statement of claim contravene s 23(1) of the Courts of Judicature Act 1964 ('the CJA'). The cause of action arose, if at all, in New F Delhi, India and not in Malaysia.

[4] The defendant is a body corporate constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act 1970 having its head office at 7, Bihikaji Cama Place, 110607, New Delhi and branch office at G CC-2, 1, Nehru Enclave, Kalkaji, 110019, New Delhi. The defendant has no domicile, existence or presence in Malaysia.

[5] The facts on which the proceedings are based and/or are alleged to have H occurred in New Delhi, India.

[6] The proper forum for this dispute is India as the applicant of the letter of credit, which has not been made a party to this proceedings, is located in India. The request to open the letter of credit was made in India. The letter of I credit was issued in India. The main documents and the discrepancies in relation to them and including the rejection of the documents were made in and from India. The subject matter of the dispute in all facts and circumstances has a close nexus with the jurisdiction of the High Court of Delhi, India.

[7] Any payments that were to be made or ought to have been made were from India in US Dollar and to Wells Fargo Bank, New York, United States of America, and as such, showing that Malaysia is not a proper forum for these proceedings to be conducted.

[8] Sara International Ltd, India the applicant of the letter of credit have entered into a contract with Sims Copper Sdn Bhd Malaysia. At the request of Sara International Ltd, the defendant opened a letter of credit from New Delhi, India. Sara International Ltd has subsequently filed a suit and taken civil action in the Delhi High Court against Sims Copper Sdn Bhd, the plaintiff, the defendant and Wells Fargo Bank.

[9] Any action taken in regards to approval and opening of the letter of credit and discrepancies in the documents were taken in line with laws applicable in India together with the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce 600 ('UCP 600'), which would differ from the laws of Malaysia.

[10] The defendant has never agreed nor intended, directly or indirectly, to be subjected to the jurisdiction of this court nor any other courts in Malaysia. The plaintiff's claim herein is a veiled attempt to mislead this court into granting reliefs, which were never in the contemplation of the parties.

[11] The defendant also intends to produce several witnesses, including witnesses from the applicant of the letter of credit, as well as voluminous documentary evidence, which are all located in New Delhi, India and would tantamount to an unnecessary costly affair, costs of which the defendant may not be able to fully recover from the plaintiff.

[12] The plaintiff is only acting in an advisory bank role and have no locus standi to bring this action.

BACKGROUND

[13] The plaintiff is a licensed bank incorporated in Malaysia and the defendant is a bank incorporated in India. The writ dated 28 January 2014 and the statement of claim dated 28 January 2014 filed by the plaintiff against the defendant is to recover payment and reimbursement under a letter of credit issued by the defendant.

[14] On 6 March 2014, the court granted leave to the plaintiff to serve the writ dated 28 January 2014 ('writ'), statement of claim dated 24 January 2014 ('statement of claim') and notice of writ to be served out of jurisdiction dated 11 March 2014 ('notice of writ') on the defendant in India. The writ, statement

of claim and notice of writ have been duly served on the defendant on 11 April 2014 and the defendant entered appearance on 23 May 2014.

[15] On 18 November 2011, at the request of the defendant, the plaintiff agreed to act in the letter of credit ('LC') transaction. LC was issued by the defendant as the issuing bank, at the request of Sara International Ltd ('the applicant'). The beneficiary of the LC is SIMS Copper Sdn Bhd ('the beneficiary'). The LC was relayed by the defendant to the plaintiff through the Royal Bank of Scotland ('RBS') as the plaintiff, at that time, did not have a commercial relationship with the defendant.

[16] Upon agreeing to act in the LC transaction, the plaintiff accordingly advised the opening of the LC and the terms of the LC to the beneficiary. Pursuant to the terms of the LC, the defendant irrevocably undertook to pay and reimburse the plaintiff of any payment made by the plaintiff to the beneficiary under the LC upon negotiation of the documents presented by the beneficiary and presentation of documents that constitute a complying presentation ('reimbursement undertaking').

[17] The said LC is governed by Uniform Customs and Practice for Documentary Credits 600 ('UCP 600'). The plaintiff acted as the advising bank of the LC and the said LC is negotiable by any bank in Malaysia.

[18] The beneficiary was required to present the documents stated in the LC to claim for payment. On 23 November 2011, the plaintiff received from RBS, a SWIFT message dated 21 November 2011 from the defendant advising the amendments to LC Credit.

[19] On 25 November 2011, the beneficiary presented the documents required under the LC ('documents') to the plaintiff by ten separate presentations and requested the plaintiff to negotiate the LC. After having been satisfied that the documents constituted a complying presentation, the plaintiff, relying on the irrevocable undertaking given by the defendant, negotiated the LC and made a total payment of USD1,983,765.65 to the beneficiary.

[20] On 1 December 2011, the plaintiff presented the documents to the defendant by courier. The documents were then duly delivered to the defendant on 3 December 2011. The plaintiff also sought payment and reimbursement of USD1,983,765.65 from the defendant, pursuant to the reimbursement undertaking and UCP.

[21] On 5 December 2011, after delivery of the documents, the plaintiff received from RBS, a SWIFT message dated 1 December 2011 from the

defendant advising the amendments to the LC. The amendment requested was for an additional document of certificate of analysis, weight and quality ('certificate') to be presented by the beneficiary under the LC ('proposed amendment'). The proposed amendment however, had not been accepted by the plaintiff or the beneficiary.

[22] On 20 December 2011, the plaintiff received a SWIFT dated from the defendant alleging the following purported discrepancies in the documents presented:

(a) the bill of lading was not acceptable as it was not in accordance with the terms under the LC; and

(b) the certificate was not submitted to the defendant.

This was the first time the plaintiff received a notice of refusal from the defendant.

[23] The plaintiff received a SWIFT dated 21 December 2011 from Wells Fargo Bank, New York (formerly known as Wachovia Bank, New York) ('Wells Fargo') informing the plaintiff that the defendant is refusing payment due to the aforesaid purported discrepancies. Wells Fargo was appointed by the plaintiff as the plaintiff's agent for the sole purpose of tracing and receiving payment under the LC from the defendant, as the payment was to be made in USD.

[24] The SWIFT message dated 8 December 2011 from the defendant to Wells Fargo, was only sent by Wells Fargo to the plaintiff on 27 September 2013 upon the plaintiff's request. Despite several demands by the plaintiff, the defendant, in breach of the reimbursement undertaking and article 7.b and 7.c UCP, has failed to make payment or reimbursement to the plaintiff.

THE UNIFORM CUSTOMS AND PRACTICE 600 (UCP 600)

[25] The UCP 600 is the latest revision of the Uniform Customs and Practice that governs the operation of letters of credit. The UCP 600 came into effect on 1 July 2007. The objective of the UCP 600 is to create a set of uniform contractual rules on letter of credit practice throughout the world. The UCP 600, however, does not contain any governing law or jurisdiction clauses.

THE FORUM OF CONVENIENCE

[26] The main issue in the instant application is whether this court has jurisdiction to try the action. If it has, the grounds that the plaintiff's writ and statement of claim dated 24 January 2014, notice of writ to be served out of

jurisdiction dated 11 March 2014, Order for service out of jurisdiction dated 6 March 2014 and all others filed here be set aside, discharged and dismissed.

[27] Order 12 r 10(1) of the ROC provides as follows,

> 10 Dispute as to jurisdiction 10.(1) A defendant who intends to dispute the jurisdiction of the Court in the proceedings by reason of any irregularity as is mentioned in rule 9 or on any other ground shall enter an appearance and, within the time limited for serving a defence, apply to the Court for –
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> (a) an order setting aside the writ or service of the writ on him;
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> (b) ... ;
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> (c) ... ;
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> (d) ... ;
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> (e) ... ;
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> (f) the discharge of any order made to prevent any dealing with any property of the defendant;
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> (g) a declaration that in the circumstances of the case the Court has no jurisdiction over the defendant in respect of the subject matter of the claim or the relief or remedy sought in the action;
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> or
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> (h) ... .

[28] Order 12 r 2 of the ROC further provides as follows:

> (1) A memorandum of appearance is a request to the Registry to enter an appearance for a defendant or defendants as specified in the memorandum.
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> (2) A memorandum of appearance shall be in Form 11 and both the memorandum of appearance and the copy thereof required for entering an appearance shall be signed by the solicitor by whom the defendant appears or, if the defendant appears in person, by the defendant.
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> (3) A memorandum of appearance shall specify –
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> (a) in the case of a defendant appearing in person, the address of his place of residence and, if his place of residence is not within the jurisdiction or if he has no place of residence, the address of a place within the jurisdiction at or to which documents for him may be delivered or sent; and
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> (b) in the case of a defendant appearing by a solicitor, the business address of his solicitor within the jurisdiction, and where the defendant enters an appearance in person, the Address within the jurisdiction specified under sub paragraph (a) shall be his address for service, but otherwise

the business address of his solicitor shall be his address for service.

(4) If the memorandum of appearance does not specify the defendant's address for service or the Court is satisfied that any address specified in the memorandum of appearance is not genuine, the Court may, on an application by the plaintiff set aside the appearance or order the defendant to give an address or a genuine address for service, as the case may be, and may in any case direct that the appearance shall nevertheless have effect for the purposes of Order 10 , rule 1(3) and Order 62, rule 10.

[29] The civil jurisdiction of the High Court in Malaya, as well as that of the High Court in Sabah and Sarawak, is set out in s 23(1) of the Courts of Judicature Act 1964, which provides as follows:

(1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where –

(a) the cause of action arose; or

(b) the defendant or one of several defendants resides or has his place of business; or

(c) the facts on which the proceedings are based exist or are alleged to have occurred; or

(d) any land the ownership of which is disputed is situated, within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

[30] The plaintiff's cause of action against the defendant is to enforce the performance of the defendant's obligation to make payment and reimbursement under the aforesaid LC. The applicant of the LC and the defendant are based in India. However, the plaintiff and the beneficiary are based in Malaysia. The LC was issued to facilitate payment of the sale of goods by the beneficiary to the applicant in India. Payment of the goods was to be settled by the LC made available by the defendant and received by the beneficiary in Malaysia.

[31] At the request of the applicant, the LC was issued by the defendant in favour of the beneficiary in Kuala Lumpur. The defendant through the RBS requested the plaintiff to act in the LC transaction in Kuala Lumpur. The LC was advised by the plaintiff to the beneficiary in Kuala Lumpur.

[32] The beneficiary presented the documents to the plaintiff in Kuala Lumpur. The plaintiff accepted the documents and negotiated the documents as well as the LC in Kuala Lumpur. Payment was made under the LC in Kuala Lumpur to the beneficiary. The plaintiff then presented the documents

received from the beneficiary to the defendant in India.

[33] The Supreme Court case of *American Express Bank Ltd v Mohamad Toufic Al-Ozier & Anor* [1995] 1 MLJ 160; [1995] 1 CLJ 273 held that a Malaysian court has jurisdiction over a foreign defendant at common law if the said defendant is residing in Malaysia or if he submits to jurisdiction if not so present. However, if he is not present here and has not submitted to jurisdiction, the Malaysian court can assume such jurisdiction statutorily under O 11 r 1 of the ROC as jurisdiction is implicit in the power to grant leave by the High Court for service out of jurisdiction.

[34] In the present case, although the defendant is not present within the jurisdiction and had not submitted to the jurisdiction of the Malaysian court, the fact remains that the statement of claim is based on a cause of action which arose in Malaysia. The LC was issued by the defendant in favour of the beneficiary based in Kuala Lumpur. The LC was advised by the plaintiff in Kuala Lumpur and the LC allowed negotiation by any banks in Malaysia and the said negotiation took place in Malaysia.

[35] I have read and considered the comprehensive written submissions and the authorities submitted by both learned counsels. It appears to this court that this court has the jurisdiction to hear this matter.

[36] Based on the affidavits, the LC was made within the jurisdiction of Malaysia. The payment under the LC was received by the beneficiary in Malaysia upon presentation of documents in Malaysia. It is this court's considered view that the cause of action arose in Malaysia as the place where the payment to the beneficiary was made. The defendant was required by the LC to perform its obligation to reimburse the plaintiff upon the presentation of the documents by the beneficiary in Malaysia. Since the cause of action arose in Malaysia, the High Court in Malaya has jurisdiction to try the action.

[37] Furthermore, all the original documents relating to the LC have been returned to the plaintiff in Kuala Lumpur. The main issue to be determined in the trial is whether the defendant had given a valid notice of refusal pursuant to the UCP600.

[38] In the circumstances, I am satisfied that the plaintiff's writ ought not be set aside. Accordingly, encl 12 is dismissed with cost.

Application dismissed with costs.

Reported by Ashok Kumar